Mongolia in Transition

An Analysis of Mongolian Laws Affecting Freedom of Expression and Information

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Executive Summary

This Report analyses Mongolian law and practice in comparison to international and comparative standards relating to freedom of expression and information. Although Mongolia has made key steps forward in terms of respect for human rights, including freedom of expression, much remains to be done to ensure full consistency with international law. Indeed, some of the laws passed in the post-communist era impose wide-ranging restrictions, particularly in relation to secrecy.

The leading international statement of the guarantee of freedom of expression is found at Article 19 of the *Universal Declaration of Human Rights*, which guarantees the right to "seek, receive and impart information and ideas through any media and regardless of frontiers". Mongolia has also ratified the *International Covenant on Civil and Political Rights*, a legally binding treaty which guarantees freedom of expression in terms similar to those of the *Universal Declaration of Human Rights*.

The guarantee of freedom of expression applies to everyone and international courts have emphasised the particular role of the media in ensuring a free flow of information and ideas. The European Court of Human Rights, for example, has stressed the "pre-eminent role of the press in a State governed by the rule of law."[1] A key concept behind this role of the media is ensuring a diversity of media and hence of sources of information and ideas. Media freedom depends on independence from government control and another key concept flowing from the guarantee of freedom of expression is that any bodies with regulatory powers over the media, such as broadcast licensing bodies, must be protected against political, and also commercial, interference.

International law does allow for a limited regime of restrictions to the right to freedom of expression but only where they meet a strict three-part test. Any restriction must first be set out clearly in law. Second, any restriction must serve one of the list of legitimate aims provided for under international law, including such public interests as national security, the rights of others and public order. Third, and most important, any restriction must be necessary to protect this aim in the sense that it does not go beyond what is required and is proportionate to the goal.

This Report analyses Mongolia law in nine substantive sections. The first section, in Chapter 4, looks at the guarantees for freedom of expression in the Constitution of Mongolia. The key shortcoming with these guarantees is that they do not require restrictions on freedom of expression to be necessary to protect the legitimate aims listed. This is a serious weakness in the constitutional guarantees, although it could be somewhat mitigated by judicial interpretation.

The second substantive issue analysed is the general requirement for all media to register. Although a requirement of this sort is not *per se* contrary to international law, mandatory registration is not necessary and ARTICLE 19 and Globe International recommend that it be abolished. In any case, the registration system needs to be amended so that it is overseen by a body which is independent of government.

[1] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

Furthermore, the system at present imposes a number of substantive conditions on the media, which is clearly contrary to international law.

Chapter 6 deals with broadcast regulation, including public and private broadcasting. The Report analyses in some detail the draft Law on Public Radio and Television which has been produced by the Ministry of Justice but which has not yet been put to Parliament. Although the draft law, if passed, would certainly improve the existing situation, a key problem is that it fails adequately to guarantee the independence of the public broadcaster, a matter of some importance. Other weaknesses with this law include obligations to carry messages of certain leading officials, the lack of a clear funding framework for the public broadcaster and the lack of accountability mechanisms.

Similar problems apply in relation to private broadcasting. The regulatory body is not independent of government; the Prime Minister appoints all of the members. This opens up the possibility of political interference. Another problem is that there are no clear rules for deciding between competing licence applications, again allowing for political interference. Furthermore, there is no requirement that the application process be transparent and no provision for public input.

A key problem in Mongolia is the lack of openness of public bodies, the subject of Chapter 7 on Freedom of Information. Mongolia does not have freedom of information legislation guaranteeing everyone the right to access information held by public bodies and in practice a strong culture of secrecy pervades the civil service. Instead, a range of broad secrecy provisions apply not only to public actors but also private bodies. Although some official secrecy is legitimate, the provisions applicable in Mongolia go far beyond what is justified under international law. Urgent review of these provisions is a priority.

Defamation suits abound in Mongolia, some 83 cases having been decided in just six district courts in Ulan Bator over the past three years. Chapter 8 analyses the Mongolia laws on defamation, both criminal and civil. ARTICLE 19 and Globe International are of the view that defamation laws should be exclusively civil in nature, since this provides adequate protection for reputations, and therefore recommend that the criminal defamation provisions be repealed in their entirety. Furthermore, there are a number of problems with the civil defamation laws, in particular the lack of adequate defences. There is no defence of reasonable publication to cover cases where the impugned statements may be false but it was nevertheless reasonable in all the circumstances to publish them.

Another set of restrictions on freedom of expression place limits on the content of what is published or broadcast. These limits, analysed in Chapter 9, apply to obscene materials, to statements regarding legal proceedings and to a variety of other issues, such as promoting war or hatred on the basis of race. In most cases, these restrictions pursue a legitimate aim; the problem is that they are either excessively broad or very vague in nature. This allows them to be abused for political or other illegitimate goals. Furthermore, in a number of cases, media outlets have been closed for allegedly publishing obscene material. This is an extremely harsh sanction, which ARTICLE 19 and Globe International view as unnecessary. If it is to be applied, this should only

ever be in relation to repeated and gross abuse of the law and pursuant to a court decision.

Mongolian law also imposes positive obligations on the media to achieve certain social goals or to carry statements made by senior officials, analysed in Chapter 10. Such obligations are unnecessary because a diverse, vibrant media will in any case promote those goals and ensure coverage of events of national importance. At the same time, they are open to abuse as officials may take advantage of them to make political statements. We therefore recommend that all such obligations be removed from Mongolian law.

Mongolian law does not protect the right of journalists not to reveal their confidential sources. Such a right, necessary to protect the flow of information from sources to journalists, and then from them to the public, has been widely recognised by international, as well as national, courts. This serious omission in the law is discussed in Chapter 11.

The last substantive section looks at the issue of media coverage of elections. It is of particular importance that the electorate are fully informed during election periods about how to vote, about the political parties, candidates and campaign issues, and about other matters relevant to the election. It is important that broadcasters, and particularly public broadcasters, are balanced and impartial during election periods, as well as at other times. Furthermore, voters need to hear the views of the different parties and candidates and, to achieve this, parties and candidates should be guaranteed direct access to the media on an equitable basis to present their views and platforms. The various Mongolian laws governing the holding of elections go some way to ensuring these rights but some further improvements could be made, as analysed in Chapter 12.

1. INTRODUCTION

Mongolia has experienced significant democratic change since the end of one-party communist rule in 1990. In 1992, a new constitution was adopted which formally established a democratic system and protected human rights, including the right to freedom of expression. Respect for human rights has increased substantially since that time and a number of laws have been passed which guarantee rights. A large number of the new laws directly impact on freedom of expression. At present, ninety-one laws contain provisions which relate to the media, including the 1998 Law on Media Freedom of the Media.

Mongolia is a member of the United Nations and a State Party to the *International Covenant on Civil and Political Rights*. As such, it is legally bound to protect human rights, including freedom of expression, in accordance with international law. This is formally recognised in the Constitution of Mongolia.

This report outlines the obligations of Mongolia to promote and protect freedom of expression under international law. It describes the guarantee of freedom of expression, particularly in relation to the media, and the limited scope of restrictions on freedom of expression which international law permits, along with the test against which any restriction must be judged. It then goes on to assess the Constitution of Mongolia and laws against these standards, highlighting some key concerns and making recommendations on how to address them.

The Constitution of Mongolia and laws contain a number of positive features, including explicit guarantees for freedom of expression and media freedom. At the same time, several legal provisions are in breach of international standards relating to freedom of expression and other provisions which, while not necessarily formally in breach of international law, are unnecessary or could be improved.

2. BACKGROUND

History

For much of history, the nomadic peoples of north Asia were scattered across large land masses with little sense of unity. By the thirteenth century, however, the Mongols, unified by Chinggis (Ghengis) Khan, controlled the largest empire in the world. Less than a hundred years later, the empire began to disintegrate and by the eighteenth century, the Mongols were under the control of Manchu China. When China's Qing dynasty collapsed in 1911, Mongolia again became independent. In 1924, however, Mongolia became the world's second communist country, and for much of next seventy years, it was a Soviet client state.

A period of democratic reform was initiated in 1990, following the disintegration of the Soviet Union. After pro-democracy protests, the Mongolian People's Revolutionary Party (MPRP) amended the constitution to allow for multiparty elections. In 1992, a new constitution was adopted which effectively transformed the

country into an independent, democratic state. Parliamentary elections were held in 1992, 1996 and 2000. The MPRP won 71 of 76 seats in the 1992 election, but in the 1996 election the Mongolian Democratic Coalition won 50 seats, with the MPRP retaining only 25. In 2000, however, the MPRP was back in power, winning 72 of 76 seats.

Geography, People and the Economy

Mongolia is a large country of some 1.5 million square kilometers with a comparatively small population of approximately 2.4 million people. It is sandwiched between two large powers – Russia and China. About one-third of the population lives in Ulan Bator, the capital city, and a significant proportion of the population in rural areas continues to live a nomadic lifestyle.

The great majority of the population is ethnically Mongolian and most of these are Buddhist, although there is a minority of Sunni Muslim Kazakhs living near the western border areas. The main language is Mongolian but many of the middle-aged urban elite, who were educated in the former Soviet Union, are also fluent in Russian. Despite attempts to reintroduce the Mongolian alphabet, which was disposed of during the communist era, the Cyrillic script is still predominant.

Mongolia is a low-income country and the average annual income per capita is estimated to be US$390. Economic conditions have been poor since the loss of Soviet support in 1990. At the behest of the International Monetary Fund and donor countries, the government has embarked on a programme of privatisation and free markets reforms. Nonetheless, economic growth remains relatively low and unemployment high.

The Government and Political System

Mongolia has a parliamentary system of government. The highest political body of the Mongolian State is the State Great Khural, a unicameral parliament of 76 members who are directly elected for four-year terms. The government, or executive body of the State, is comprised of the Prime Minister and cabinet members, who are accountable to the State Great Khural. The head of state is the President whose powers are limited in accordance with the country's parliamentary system.

Mongolia is administratively or territorailly divided into 21 aimags (provinces) and the capital city, Ulan Bator. The aimags are further subdivided into soums and bugs and Ulan Bator into districts and horoos. All these geographical sub-units are governed by local parliaments or Khurals of Citizens Representatives. Governors, who are nominated by the local Khural and appointed by the State Government Office, administer State authority in the aimags.

The Legal System and Human Rights

Mongolia has a system of independent courts. The Supreme Court is the court of last appeal for criminal, civil and administrative matters and the Constitutional Court has jurisdiction over constitutional matters. Human rights are protected in the 1992

Constitution and in late 2000 a law was adopted establishing a national human rights commission.[2]

Since the end of communist rule, a large number of laws have been passed provide far greater protection to human rights than was previously the case. This applies to the right to freedom of expression as well as other rights. One recent example of this is Article 1369.1 of the New Criminal Code, which will come into force on 1 September 2002, and which makes it a crime to interfere with the lawful professional activities of a journalist with the aim of promoting one's own interests. At the same time, a large number of provisions unduly restricting freedom of expression remain from the communist period and many of the new laws also contain excessive restrictions.

Television and Radio

The number of television and radio broadcasters has been increasing steadily in recent years. As of December 2001, 31 television stations, 37 radio stations and 9 cable television outlets were operating.[3] Despite the Law on Freedom of Media, which prohibits State ownership of the media, many television and radio broadcasters continue to be owned and operated by the State or local government or assemblies.

The only national television and radio stations – Mongolian Undesnii TV (established in 1967) and Mongolian Radio (established in 1934) – are run by the Radio and Television Authority of the Government of Mongolia. In Ulan Bator, there are four terrestrial television stations: Mongolian National Radio and TV, Channel 25 owned by MN-Mongol News Company, Eagle TV – a Mongolian-American joint venture – and UBS TV. UBS TV is operated by the Ulan Bator local assembly. There are also a number of cable channels. In terms of radio, there are 12 stations in Ulan Bator, including the Mongolian Radio-owned FM 100.9, Khukh Tenger radio and several privately owned stations. Local television stations outside Ulan Bator are predominantly run by local governments and assemblies, although private stations also exist. There is a greater mix in local radio station ownership between state, private and public service (funded by foreign donor organisations) stations.[4]

The Ministry of Justice and Home Affairs is drafting a Law on Public Radio and Television, which will transform the State broadcasters into public service broadcasters, but the law has not been submitted to parliament yet.

The Print Media

The number of newspapers and magazines has also been increasing steadily in recent years, although the number of daily newspapers and weekly magazines has remained constant. As of December 2001, 178 newspapers and 50 magazines were in circulation.[5] Unlike in the broadcasting field, the national State-owned newspapers – Ardyn Erkh and Government News – have been privatised. In the provinces, however, local assemblies continue to own print media. Mongolia has five daily newspapers with nationwide circulation: four privately owned – Zuuny medee, Mongolyn medee,

[2] Law on the National Human Rights Commission of Mongolia, adopted on 7 December 2000.
[3] Press Institute, *Monitoring 2001 Mongolian Media* (Ulan Bator: 2002), p. 3.
[4] *Ibid*., pp. 25-35.
[5] *Ibid*., p. 3.

Udriin sonin and Unoodor – and one – Unen – owned by the governing Mongolian People's Revolutionary Party.[6]

The Economic Climate

The economic climate for the media is difficult. Although 1090 newspapers, 234 magazines and 120 television and radio stations were registered with the Ministry of Justice and Home Affairs, only 178 newspapers, 50 magazines, 31 television stations, 37 radio stations and 9 cable television operators were active in 2001.[7] According to a recent survey, only 20% of television stations reported making a profit, while 40% covered their expenses and 40% incurred losses. In radio broadcasting, only 5% of stations reported making a profit, while 95% only covered expenses. In the print media, 68.75% of newspapers reported that they only covered expenses, while 31.25% incurred losses.[8]

A new Law on Advertising was adopted on 30 May 2002 but it has not yet been officially published. At present, most advertising goes to the State-owned national television and radio stations and large newspapers. Many media outlets also complain that the tax system undermines their financial viability. The media reportedly have to pay a wide variety of taxes – such as VAT, customs duties and income tax on staff salaries – with few, if any, exemptions or breaks.

Use of Laws against the Media

The Mongolian media report two major areas of concern in recent years, namely the steady increase in defamation cases and the closure of media outlets by the government.

The number of defamation cases in Mongolia has increased substantially since the early 1990s. In 1991, there were seven civil defamation cases while in 2000 there were 39. There were also four criminal defamation cases between 1999 and 2001. Moreover, between 1999 and 2001, 59.5 % of defendants were found guilty in civil defamation cases and 29.1% admitted to guilt and settled with the plaintiff. In the four criminal proceedings during the same period, six journalists were tried and found guilty, although only one was sentenced to imprisonment, which was then suspended subject to probation.[9]

In September 2000, the Ministry of Justice and Home Affairs, the National Taxation Office and the Press Institute inspected 150 newspapers, 50 magazines and 70 other media outlets to identify whether their activities were in conformity with the Law on Prevention of Crimes, the Law on Measures Against Obscenity, the Law on Anti-Alcoholism and the Law Against Harms of Tobacco. Fines were imposed on 21 newspapers and one television station, and three tabloids had their registration revoked and were closed down.[10]

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[6] *Ibid*., pp. 6-19.
[7] *Ibid*., p. 3.
[8] [NEED TITLE OF PUBLICATION IN ENGLISH FROM GLOBE]
[9] Mongolian Foundation for Open Society (Soros Foundation), *Project "Legal Aid for Media"* (Ulan Bator: 2001), pp. 4-8.
[10] *Ibid*., p. 8.

3. INTERNATIONAL STANDARDS

3.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[11]

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

The *International Covenant on Civil and Political Rights* (ICCPR), a treaty ratified by over 145 States, including Mongolia,[12] imposes formal legal obligations on State Parties to respect its provisions and elaborates on many rights included in the UDHR.[13] Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

> 1. Everyone shall have the right to freedom of opinion.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),[14] which states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

Guarantees of freedom of expression are also found in the two other regional human rights systems, at Article 13 of the *American Convention on Human Rights*[15] and Article 9 of the *African Charter on Human and Peoples' Rights*.[16]

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946 the UN General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a

[11] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[12] Mongolia ratified the ICCPR on 18 November 1974.
[13] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Mongolia ratified the ICCPR on 18 November 1974.
[14] Adopted 4 November 1950, in force 3 September 1953.
[15] Adopted 22 November 1969, in force 18 July 1978.
[16] Adopted 26 June 1981, in force 21 October 1986.

fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[17] The European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[18]

3.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law." [19] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[20]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[21] The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[22]

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would by unable to play its vital role of "public watchdog".[23]

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[17] 14 December 1946.
[18] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[19] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.
[20] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.
[21] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[22] *Thorgeirson v. Iceland*, note 19, para. 63.
[23] See *Castells v. Spain*, note 20, para. 43; *The Observer and Guardian v. UK*, 26 November 1991,

The Court has also held that Article 10 applies not only to the content of expression but also the means of transmission or reception.[24]

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public's right to know, and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

3.3 Pluralism

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[25] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[26]

One of the rationales behind public service broadcasting is that it makes an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

3.4 Independence of Media Bodies

In order to protect the right to freedom of expression, it is imperative that the media is permitted to operate independently from government control. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

Application No. 13585/88, 14 EHRR 153, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65.

[24] *Autronic AG v. Switzerland,* 22 May 1990, Application No. 12726/87, 12 EHRR 485, para. 47.

[25] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, 17 EHRR 93, para. 38.

[26] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 21, para. 34.

Under international law, it is well established that bodies with regulatory or administrative powers over both public and private broadcasters should be independent and be protected against political interference. For example, in a preambular paragraph, the European Convention on Transfrontier Television states that Member States "[reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters".[27] The Council of Europe has also made it clear that the independence of regulatory authorities is fundamentally important. A Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector adopted by the Council's Committee of Ministers states in a preambular paragraph:

> [T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector…specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.[28]

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.[29] The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.[30]

The Committee of Ministers' Recommendation on the Guarantee of the Independence of Public Service Broadcasting[31] provides additional guidance on this issue. This Recommendation provides that members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner and that the rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.[32]

3.5 Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[27] E.T.S. 132, in force 1 May 1993, as amended by the Protocol Amending the European Convention on Transfrontier Television, E.T.S. 171, in force 1 October 2000.
[28] Recommendation No. R(2000) 23, adopted 20 December 2000.
[29] *Ibid.*, Guideline 1.
[30] *Ibid.*, Guideline 5.
[31] Recommendation No. R(96) 10, adopted 11 September 1996.
[32] *Ibid.*, Guideline III.,

Article 10(2) of the ECHR also recognises that freedom of expression may, in certain prescribed circumstances, be limited:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Restrictions must meet a strict three-part test.[33] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[34]

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[35] Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR and Article 10(2) of the ECHR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[36]

3.6 Obligation to Follow International Law

Mongolia is a member of the United Nations and a State Party to the ICCPR. As such, Mongolia is legally bound to protect freedom of expression in accordance with international law.

This is formally recognised in Article 10 of the Constitution of Mongolia which states:

> (1) Mongolia adheres to the universally recognized norms and principles of international law and pursues a peaceful foreign policy.
> (2) Mongolia fulfills in good faith its obligations under international treaties to which it is a Party.

[33] See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).
[34] See, for example, *Thorgeirson v. Iceland*, note 19, para. 63.
[35] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.
[36] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

(3) The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
(4) Mongolia may not abide by any international treaty or other instruments incompatible with its Constitution.

Therefore, both international law and the Constitution of Mongolia require domestic law and practice to be consistent with Mongolia's ICCPR treaty obligations on freedom of expression.

4. Constitutional Guarantees

Freedom of expression and information are protected in Article 16 of the Constitution of Mongolia which states:

> The citizens of Mongolia are enjoying the following rights and freedoms:
> …
> 16) Freedom of thought, opinion, expression, speech, press, and peaceful assembly. Procedures for organizing demonstrations and other assemblies are determined by law.
> 17) The right to seek and receive information except that which the state and its bodies are legally bound to protect as secret. In order to protect human rights, dignity, and reputation of persons and to ensure national defense, security, and public order, the information which is not subject to disclosure must be classified and protected by law.

As noted above, under international law, freedom of expression includes the right to "seek, receive and impart" information "regardless of frontiers".[37] Article 16.17 protects the right to "seek and receive" information, but it does not include the right to "impart" information. Furthermore, the right is not guaranteed "regardless of frontiers".

Under international law, any restriction on freedom of expression must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society.[38] Article 16.17 requires any restriction to be prescribed by law and pursue a legitimate aim. However, it fails to require restrictions to be "necessary in a democratic society". This is in practice the most important limitation on the power of the government to restrict freedom of expression and its absence from the constitution is a serious omission.

Article 10 of the Constitution of Mongolian provides that Mongolia respects international law, which sub-Article (3) states:

> The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.

This guarantee places international treaties on an equal basis with domestic legislation. Stronger provisions are found in some other laws. For example, Article 2.2 of the Law on Communications provides that if any provision of that law is

[37] See Article 19(2) of the ICCPR.
[38] See Article 19(3) of the ICCPR and Article 10(2) of the ECHR.

inconsistent with an international treaty to which Mongolia is a party, the latter shall prevail and the same provision is found in Article 2.2 of the Law on the National Human Rights Commission of Mongolia.

While the constitutional clause is a welcome recognition of international law, human rights treaties should not simply be treated as equal to national legislation but should, in case of conflict, supersede domestic laws, as is the case with the Law on Communications.

The Law on the National Human Rights Commission of Mongolia establishes a body whose role is to ensure the promotion and protection of the rights guaranteed by the constitution, laws and international human rights treaties (Article 3.1). The Commission has a role, among other things, to hear complaints regarding human rights abuses and it would appear that it has already considered at least one complaint relating to freedom of expression. Inasmuch as the Commission can provide appropriate mediation on complaints, based on a solid understanding of human rights, this is a positive way of dealing with complaints.

Recommendations:

- Articles 16.16 and 16.17 should be amended as follows:
  - the right to seek, receive and "impart" information "regardless of frontiers" should be guaranteed;
  - any restriction on freedom of expression should be required to be "necessary in a democratic society"; and
  - international human rights treaties should supersede domestic legislation.

5. General Registration Requirement

All media are required to register in Mongolia. Article 20.4.2.3 of the Law on the Cabinet provides that the Minister of Justice shall manage registration of the media and Order No. 267 of the Cabinet provides for a registration requirement for the media, along with the procedures and conditions for registration. Paragraph 5 of Order No. 267 sets out the information which the media outlet must provide in order to register, including:

- name, purpose and plan of activities;
- decision of the founders to register;
- names and addresses of the founder, publisher and members of the editorial board; and
- number of copies, size and funding sources.

Paragraph 7 provides for refusal of registration if the information is not complete or the policy, purpose or activities contradict the laws of Mongolia. Furthermore, Paragraph 1 states that media must be consistent with the ideas of the Constitution, not contradict State sovereignty and national unity, not reveal State secrets, and not promote obscenity, murder or terror.

Under international law, a licensing requirement for the print media which involves the possibility of being refused a licence except on purely technical grounds is

illegitimate. Licensing requirements cannot be justified as a legitimate restriction on freedom of expression since they can significantly fetter the free flow of information, they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing.

Technical registration requirements do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries.[39] ARTICLE 19 and Globe International therefore recommend that the print media not be required to register. As the UN Human Rights Committee has noted: "Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[40]

The registration system established under Article 20 of the Law on the Cabinet and Order No. 267 of the Cabinet, at least inasmuch as it applies to the print media, fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression. First, Article 20.4.3 requires the media to register with the Minister of Justice and Internal Affairs. The registration system should be administered by a body which is independent of government. Second, Paragraphs 7 and 1 of Order No. 267 provide for refusal of registration if submitted materials fail to meet a range of substantive conditions. A registration system should not impose substantive conditions upon the press.

The UN Human Rights Committee has also ruled that legal provisions which require small circulation publications to register are illegitimate. In a recent case, the Committee held that the legal requirement for an author to register his publication, which had a circulation of just 200 copies, was disproportionately onerous, exerted a chilling effect on freedom of expression, and could not be justified in a democratic society.[41] In particular, the Committee stated:

> [P]ublishers of periodicals…are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.[42]

Mongolian law does not exempt small circulation publications from registration.

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[39] For example, in Australia, Canada, Germany, the Netherlands, Norway and the United States.
[40] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.
[41] *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras. 8.1-8.5.
[42] *Ibid.*, para. 8.1

Inasmuch as the registration requirements apply to broadcasters, they effectively duplicate the obligation on broadcasters to obtain a license, pursuant to the Law on Radio Waves and the Law on Communications. There is, therefore, no reason to impose this additional administrative requirement on them.

Recommendations:

- The registration system provided for in Article 20 of the Law on the Cabinet and Order No. 267 should be abolished.
- Alternatively, if the system is retained, it should:
  - be administered by a body which is independent of government (amend Article 20.4.3 of the Law on the Cabinet);
  - not impose substantive conditions (repeal relevant provisions in Paragraphs 7 and 1 of Order No. 267); and
  - exempt small circulation publications from the registration requirements.
- Broadcasters should not be required to register in addition to obtaining a licence.

6. Broadcasting

Radio broadcasting in Mongolia is regulated by the Law on Radio Waves of June 1999 and the Law on Communications, passed on 18 October 2001. These laws regulate the technical aspects of broadcasting and establish a licensing system.

6.1 Public Service Broadcasting

Article 4 of the Law on Freedom of Media prohibits government institutions from having media under their control or jurisdiction. In implementing the Law on Media Freedom, the Mongolian Parliament passed a resolution, which provides:

> 4. The Department of the Radio and TV Affairs [the State Radio and TV] and the Montsame agency are to be dismantled as government coordination agencies and to be organized as national public media organizations.

Neither the Law on Radio Waves nor the Law on Communications provides for public service broadcasting. As a result, the State-funded broadcasters continue to operate under the control of government. However, a new draft Law on Public Radio and Television was drafted by the Ministry of Justice, although the draft, now over a year old, has not yet been formally placed before the legislature.

ARTICLE 19 has adopted a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcasting*, which set out standards in this area based on international and comparative law.[43] In addition, the Committee of Ministers of the Council of Europe has adopted a Recommendation on the Guarantee of the Independence of Public Service Broadcasting.[44] The following

[43] (London: March 2002).
[44] Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting , adopted 11 September 1996.

analysis is drawn from those sets of principles, as well as other authoritative standards in this area.

A key aspect of the international standards relating to public broadcasting is that State broadcasters should be transformed into independent public service broadcasters with a mandate to serve the public interest.[45] The Council of Europe Recommendation stresses the need for public broadcasters to be fully independent of government and commercial interests, stating that the "legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy" in all key areas, including "the editing and presentation of news and current affairs programmes."[46]

The ARTICLE 19 Principles set out a number of ways of ensuring that public broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.[47]

6.1.1 Independence

The draft Law of Mongolia on Public Radio and Television does include a number of provisions designed to protect the independence of the national broadcaster. Article 3.1 states that the public broadcaster has a duty to serve only public interests and Article 3.3 provides that its activities should be based on independence. The draft law provides for a Representative Governing Board with extensive governing powers and Article 4.4 allows government to veto the decisions of this body only in exceptional circumstances.

Structure

Independence is, however, undermined in a number of ways. A key problem is that the very structure of public radio and television places it under substantial government control. Article 4.2 provides that the founder shall be the State and that the government shall take the decision to establish it. It is not clear whether this power extends to abolishing the public broadcaster as well, but this is normally a corollary of

[45] See *Access to the Airwaves*, *ibid.*, Principle 34. See also the Declaration of Sofia, adopted under the auspices of UNESCO by the European Seminar on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe), 13 September 1997, which states: "State-owned broadcasting and news agencies should be, as a matter of priority, reformed and granted status of journalistic and editorial independence as open public service institutions."
[46] Recommendation No. R (96) 10, note 44, Guideline I.
[47] *Access to the Airwaves*, note 43, Principle 35.1.

the power to establish. Pursuant to Article 4.3, the government has the right to adopt the statutes. Furthermore, the government holds 100% of the shares (Article 6.2). Finally, Article 18.3 refers to a Supervision Commission to control the implementation of the Representative Governing Board's decisions. It is unclear what this body is, what, precisely, its role is, and why it is necessary.

In many countries, the public broadcaster is a public company, an entity which is public in nature but which does not need to be under direct State, or certainly government, control or ownership. The public broadcaster needs to have a legal structure that is grounded in Mongolian law but, at the same time, this structure must be able to ensure independence. It is clearly inappropriate for the government to hold the shares which should, at the very least, be vested in some other public entity. In terms of statutes, a common model is for the governing board to adopt the statutes, in some cases with key provisions, for example, relating to quorum and calling meetings, set out in the primary legislation.

Appointments to the Representative Governing Board

A serious problem with the draft Law on Public Radio and Television is the system for appointing members to the governing board. Article 12 provides for the establishment of an independent Representative Governing Board. Pursuant to Article 13.3, nine members will be appointed to this body by the Prime Minister, three having been nominated respectively by each of the Parliament, the President and the government. Although this does involve various different State organs in the appointments process, it will often be the case, as at present in Mongolia and many other countries, that all of these are dominated by one party. Furthermore, no provision is made for openness of the process, or for the involvement of civil society.

The Recommendation of the Committee of Ministers makes a detailed statement of policy regarding appointment of members to governing boards, stating that the law should ensure that they:

> - are appointed in an open and pluralistic manner;
> - represent collectively the interests of society in general;
> - may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases;
> - may not be dismissed, suspended or replaced during their term of office by any person or body other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions;
> - may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions within the supervisory body.[48]

The proposed appointments process clearly fails to meet these standards.

It would be preferable if appointments were made by a multi-party body, such as the legislature, rather than by an individual, such as the Prime Minister. Furthermore, the

[48] Guideline III. 2. See also *Access to the Airwaves*, note 43, Principle 13.

power of nomination should not be given exclusively to political actors such as the government and president. Civil society organisations might also be given the power to nominate members, subject to acceptance by the legislature. The law should also require the appointments process to be open, so that members of the public are aware of the steps being taken. Indeed, explicit provision for public involvement should be made. This could involve the publication of a shortlist of candidates, with an opportunity for public comment, or some other mechanism.

A good example of a law which meets international standards in this area is the South African Broadcasting Act of 1999,[49] which provides for appointments to the governing board as follows:

> 13. Members of Board
> 1) The twelve non-executive members of the Board must be appointed by the President on the advice of the National Assembly.
> (2) The non-executive members of the Board must be appointed in a manner ensuring--
> (a) participation by the public in a nomination process;
> (b) transparency and openness; and
> (c) that a shortlist of candidates for appointment is published, taking into account the objects and principles of this Act.

The draft law provides for a Program Policy Commission to advise on the formulation of programme policy. Pursuant to Article 8.2, the Program Policy Commission's role is only advisory, but Article 8.4 provides that the Representative Governing Board must accept its recommendations. This needs to be clarified. The provision for a separate body to address programme issues does mitigate to some extent the problem of lack of independence of the Representative Governing Board but it is still essential to protect this key body from political interference.

Articles 13.4 and 13.5 set out a number of conditions that an individual must meet before being eligible for appointment to the Representative Governing Board, including having relevant experience, not having been convicted, not being an elected or party representative and not working for another broadcaster. These "rules of incompatibility" are very positive. Consideration should be given to adding to these rules of incompatibility provisions on conflict of interest. This would prevent individuals holding significant interests in broadcasting or telecommunications from being appointed. Similarly, Article 13.6, protecting members from removal except in case of poor health or commission of a crime, is also an important means of protecting independence. Consideration should be given to extending the grounds for dismissal to including anyone who falls into breach of the rules of incompatibility set out in Article 13.5.

Recommendations:

- A different legal form should be sought for the public broadcaster which ensures greater independence from government. In particular, the government should not be the founder or be able to establish the broadcaster, and should not hold all of the shares.

[49] No. 4 of 1999.

- The law should provide for the adoption of the statutes by the Representative Governing Board, not the government. Key provisions relating to meetings should be set out directly in the law.
- The oversight role of the Supervision Commission should either be abolished outright or the law should clearly define the nature and role of this body.
- Appointments to the Representative Governing Board should be made by the legislature, not an individual such as the Prime Minister.
- The right to make nominations should not vest exclusively in political organs of government. Civil society organisations should also have a right to nominate members for consideration by the appointing body.
- The process of appointment should be required to be open and should ensure that the public have an opportunity to make representations regarding candidates.
- The role of the Program Policy Commission should be clarified.
- The rules of incompatibility should also include provisions on conflict of interest.
- The power to remove should also apply to an individual who no longer meets the rules of incompatibility.

6.1.2 "Must Carry" Requirements

Article 10 requires the national broadcaster to carry urgent news on prevention of natural and public disasters, as well as statements by the President, Prime Minister or Parliamentary Speaker on emergencies.

While the rationale for these rules is understandable, they are both unnecessary and open to abuse. They are unnecessary because any responsible public broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private broadcasters provide ample coverage of emergencies and natural disasters, even in the absence of formal obligations to do so, which are rare in other countries. Should the public broadcaster fail in this regard, it is up to the Representative Governing Board to require it to address the problem.

Such provisions are open to abuse because officials may use them in circumstances for which they were not intended. Emergencies are not defined in the draft law and may be claimed to exist in a relatively broad range of circumstances. In fact, real emergencies are very rare. Furthermore, what is important is that the public get the information they need regarding the emergency, not that they hear statements made by senior politicians.

Recommendation:
- Article 10 should be removed from the draft law.

6.1.3 Funding

Article 17 of the draft law provides that the public broadcaster may get funding from the State budget, the license fee, advertising, donations, renting equipment, charging for programmes and other legal sources. Article 19 restricts advertising, placing an overall cap on advertising of 5% of the total daily programming time.

To ensure independence and their ability to fulfil their mandates, public service broadcasters should be adequately funded by a means that protects them from arbitrary cuts with their budgets.[50] The Committee of Ministers Recommendation states:

> The rules governing the funding of public service broadcasting organisations should be based on the principle that member states undertake to maintain, and where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.[51]

Article 17 does not specify clearly the framework for public sources of funding for the public broadcaster. It would be preferable, for example, if Article 17 guaranteed the broadcaster revenues from the license fee, the best source of funding in terms of maintaining independence. Funding from the State budget is notoriously susceptible to political interference, although in the absence of sufficient funds from the license fee and advertising, it may be necessary. Before a decision to continue direct State support is made, however, consideration should be given to other forms of funding. One possibility is giving the public broadcaster a share of the fee other broadcasters pay for a license to operate and occupy a frequency(ies). Alternatively, the law should restrict the use that can be made of any direct public subsidy, in particular allowing it to be applied only to non-programming costs, such as maintaining the transmission system. This approach, applied in a number of transitional democracies, helps to limit the potential for political control through direct funding.

The 5% limit on advertising is very stringent. Almost all public broadcasters around the world today operate on mixed funding, including advertising, and few are subjected to such stringent limits. The proportion of funding from advertising should not be so great as to undermine the public service role of the public broadcaster but at the same time it should not be so strict as to undermine its viability. The European Convention on Transfrontier Television, for example, places a 20% limit on advertising for all broadcasters and public broadcasters are commonly allowed to reach at least half of that limit.

Recommendations:

- Article 17 should provide a clearer framework regarding the public sources of funding for the public broadcaster and should, in particular, guarantee it continuing revenues from the license fee.
- Consideration should be given to alternative sources of funding rather than a direct State subsidy. Alternatively, restrictions should be placed on the use of any direct subsidy so that it is not used to support programme production.

[50] *Access to the Airwaves*, note 43, Principle 36.
[51] Guideline V.

- The 5% limit on advertising time in Article 19 should be reconsidered in favour of a higher limit, which would enhance the economic viability of the public broadcaster.

6.1.4 Accountability Mechanisms

The draft law requires the public broadcaster to submit an annual report (Article 12.2) and to have its financial report audited by an independent auditor (Article 18). These provisions could be enhanced by providing a detailed list of contents of the annual report, thereby restricting the discretion of the Representative Governing Board.

The draft law sets out programme responsibilities in Article 9 and to some extent in Article 3. The former, for example, requires programmes to be objective, professional, esteem social safety, provide pluralism, not pervert facts, respect editorial independence, promote national traditions and not include material prohibited by law. While these are useful, a more detailed statement of positive programme responsibilities would serve a number of functions. It would provide both the public and the Representative Governing Board with a clearer sense of what the public broadcaster should be doing, as well as allowing the legislature to set overall programme policy.

The ARTICLE 19 *Principles* provide a list of possible programme responsibilities for public broadcasters in Principle 37 as follows:

> The remit of public broadcasters is closely linked to their public funding and should be defined clearly in law. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, providing a service that:
>
> - provides quality, independent programming that contributes to a plurality of opinions and an informed public;
> - includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
> - provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
> - is universally accessible and serves all the people and regions of the country, including minority groups;
> - provides educational programmes and programmes directed towards children; and
> - promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

In addition, consideration should be given to including two other public accountability mechanisms in the law. First, consideration should be given to requiring the public broadcaster to establish an internal complaints mechanism. This should be in addition to any general system for complaints, including self-regulatory systems, which apply to broadcasters or the media as a whole. Individuals who felt that programmes were inappropriate or unfair could lodge complaints and, where appropriate, receive an apology or correction. Second, the public broadcaster could be required to keep itself

under continuous public review. Such obligations have been imposed, for example, on the BBC in Britain, which fulfils this requirement through public meetings, surveys and the like.

Recommendations:
- The law should set out in some detail the topics that must be covered in the annual report.
- The law should set out in more detail the precise programme responsibilities of the public broadcaster.
- Consideration should be given to adding two further accountability mechanisms, namely an internal complaints procedure and a requirement of on-going public review.

6.2 Private Broadcasting

6.2.1 Regulatory Body

Article 8 of the Law on Communications establishes a Regulatory Committee for Communications Affairs. Articles 8.2 and 8.3 provide that the Regulatory Committee shall consist of a Chairman and six Members who are nominated by the Prime Minister based on the proposal of the Minister with the portfolio for communications.

It is well established under international law, however, that bodies with regulatory or administrative powers over the media should be *independent* of government. The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, stating that Member States should establish "independent regulatory authorities for the broadcasting sector" and "include provisions in their legislation … which enable them to fulfil their missions in an effective, independent and transparent manner."[52] The ARTICLE 19 *Principles* state that the institutional autonomy and independence of such bodies should be guaranteed and protected by law, as for public broadcasters, in the following ways:

1. explicitly in the legislation which establishes the body;
2. by a clear statement of broadcast policy as well as of the powers of the regulatory body;
3. through the rules relating to membership;
4. by formal accountability to the public through a multi-party body; and
5. in funding arrangements.[53]

The Law on Communications does not specifically and explicitly guarantee the independence of the Regulatory Committee for Communications Affairs. Indeed, Article 4 of the Law on Radio Waves states that radio waves belong to the government and that the government shall allocate rights to use radio frequencies, while Article 5.2 of the same law refers to the Committee as "the *government* administrative authority in charge of communications," suggesting that it is not intended to be independent. Furthermore, Article 10 of the Law on Radio Waves

[52] Recommendation (2000) 23, adopted 20 December 2000.
[53] *Access to the Airwaves*, note 43, Principle 10.

states that licence applicants need permission from the Governors of aimags, the capital city, soums and districts before getting a licence. Clearly this does not ensure independence.

While specific provisions guaranteeing independence vary, the following is one option:

> The Regulatory Committee for Communications Affairs shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the Committee in the discharge of their duties, or to interfere with the activities of the Committee, except as specifically provided for by law.[54]

Neither the Law on Radio Waves nor the Law on Communications make a clear statement of overall broadcast policy. Legislation establishing regulatory bodies should set out clearly the policy objectives underpinning broadcast regulation, which should include promoting respect for freedom of expression, diversity, accuracy and impartiality, and the free flow of information and ideas. Regulatory bodies should be required to take into consideration and to promote these policies in all their work, and to act in the public interest at all times.[55] This is important both to restrict the activities of these bodies and to ensure that they are accountable to the public for ensuring promotion of public policies in the broadcasting sector.

The appointment process lacks independence, transparency and public participation. Members of the governing bodies of public bodies which exercise powers in the area of broadcast regulation should be appointed in a manner which minimises the risk of political or commercial interference.[56] The Committee of Ministers Recommendation stipulates that the rules governing such bodies should ensure that members "are appointed in a democratic and transparent manner."[57] This means that the process for appointing members should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.[58] To ensure this, appointments should be made by a representative body, such as an all-party parliamentary committee, rather than the executive. A shortlist of candidates should be published, to ensure transparency and so that members of the public may comment upon them.

Article 8.6.2 of the Law on Communications provides that the Chairman and Members of the Regulatory Committee shall not be persons who possess 20 percent or more of common stock of the provider or persons with common interests with the provider. While these "rules of incompatibility" are positive, additional rules should apply. The Committee of Ministers Recommendation states:

> [S]pecific rules should be defined as regards incompatibilities in order to avoid that:
> - regulatory authorities are under the influence of political power;

[54] *Access to the Airwaves*, note 43, Principle 11.
[55] *Access to the Airwaves*, note 43, Principle 12.
[56] *Access to the Airwaves*, note 43, Principle 13.1.
[57] Recommendation (2000) 23, note 52, Guideline 5.
[58] *Access to the Airwaves*, note 43, Principle 13.2.

> - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.[59]

The ARTICLE 19 Principles go further than this, stating that no one should be appointed who:

- is employed in the civil service or other branches of government;
- holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government; or
- has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.[60]

Article 8.4 of the Law on Communications provides that the term of the Chairman and Members shall be six years, but it does not explicitly protect them against dismissal prior to the end of the term. The Committee of Ministers Recommendation states that "precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure."[61] The ARTICLE 19 Principles state that no one should be subject to dismissal unless he or she:

- no longer meets the rules of incompatibility;
- commits a serious violation of his or her responsibilities, as set out in law, including through a failure to discharge those responsibilities; or
- is clearly unable to perform his or her duties effectively.

In addition, only the appointing body should have the power to dismiss and the decision should be subject to judicial review.[62]

Article 8.11 of the Law on Communications provides that the Regulatory Committee shall report its budget performance and work to the government each year. The Committee of Ministers Recommendation states: "Regulatory authorities should be accountable to the public for their activities."[63] The Regulatory Committee should therefore be accountable to a multi-party body, such as parliament or a committee thereof, rather than to the government.[64]

Article 8.11 also states that the government shall ratify the annual budget of the Regulatory Committee. However, this provides little, if any, protection to the financial independence of the Committee. The Committee of Minister's Recommendation states:

> Arrangements for the funding of regulatory authorities… should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.

[59] Recommendation (2000) 23, note 52, Guideline 4.
[60] *Access to the Airwaves*, note 43, Principle 13.3.
[61] Recommendation (2000) 23, note 52, Guideline 6.
[62] *Access to the Airwaves*, note 43, Principle 13.4.
[63] Recommendation (2000) 23, note 52, Guideline 25.
[64] *Access to the Airwaves*, note 43, Principle 15.1.

…
Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.
…
Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.[65]

Article 8.11 should incorporate these principles in order to protect the financial independence of the Regulatory Committee.

Recommendations:

- The Law on Radio Waves and Law on Communications should specifically and explicitly guarantee the independence of the Regulatory Committee for Communications Affairs.
- Article 10 of the Law on Radio Waves, stating that licence applications need the permission of the relevant Governor, should be repealed.
- The Law on Radio Waves and the Law on Communications should make a clear statement of overall broadcast policy and should require the Regulatory Committee to promote this policy in all of its work.
- Article 8.3 of the Law on Communications should be amended to provide that appointments shall be made by a representative body, such as an all-party parliamentary committee, and that the process shall be open and allow for public input.
- Article 8.6 should be amended to provide additional "rules of incompatibility", as set out above.
- Article 8.4 should further provide that:
  - the Chairman or a Member cannot be subject to dismissal unless the conditions set out above are met;
  - only the appointing body has the power to dismiss; and
  - the decision to dismiss is subject to judicial review
- Article 8.11 should be amended to provide that the Regulatory Committee is accountable to a multi-party body, such as Parliament or a committee thereof.
- Article 8.11 should incorporate provide some protection for the financial independence of the Regulatory Committee.

6.2.2 Licensing

The requirement to obtain a license to broadcast is set out in Article 7 of the Law on Radio Waves and Article 12 of the Law on Communications. Article 7 states that radio frequencies may be used upon obtaining a license from the regulatory and control authority. Article 12.1 states:

> The Regulatory Committee shall grant a license to a legal person and citizen planning to conduct the following activities on the territory of Mongolia:
> 12.1.1 run Universal Communications service.
> 12.1.2 use radio frequency and spectrum.
> 12.1.3 print postal securities.

[65] Recommendation (2000) 23, note 52, Guidelines 9-11. See also *Access to the Airwaves*, note 43, Principle 17.

It is well recognised that broadcast regulation should promote a strong, diverse broadcasting sector including both public and private broadcasters providing both radio and television services. The Committee of Ministers of the Council of Europe has stated:

> [T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector, in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests.[66]

Article 9.1.2 of the Law on Communications provides that the Regulatory Committee shall have the power to grant, suspend and revoke licenses but there are few details on the substantive criteria for granting licenses. Article 13 requires applicants to submit financial, technical and professional information and Article 14.3 states: "If several applications are submitted for a license for one area then there shall be selection tendering". It is important that criteria for deciding between licence applications be set out to ensure fairness and to ensure that decisions are made in the public interest. A Recommendation of the Council of Europe's Committee of Ministers states: "The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law."[67] The criteria should, as far as possible, be objective in nature, and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant.[68]

A basic principle of broadcasting is that the process for allocating broadcast licenses should be transparent, fair and non-discriminatory. The Council of Europe Recommendation states: "The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner."[69] Secretive and unfair licensing mechanisms may result in long delays in the awarding of licences, refusal of licences on insubstantial grounds, or the granting of licenses only to supporters of the government. Licence application hearings should therefore be public,[70] so that the merit of the application and the reasons for the authority's decisions are matters of public knowledge and debate.

Article 15 provides that the Regulatory Committee shall be entitled to revoke a license if the licensee fails to comply with its obligations under the Law on Communications or its contract, discloses privacy of communication and correspondence relations, has not started it business within one year of the issuance of the license or conducts other illegal activities. Article 15 makes an implicit and brief reference to the possibility of "suspension" of a license but does not refer to any other sanctions.

The Committee of Ministers Recommendation states: "When a broadcaster fails to respect the law or the conditions specified in his licence, the regulatory authorities

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[66] Recommendation (2000) 23, note 52.
[67] Recommendation (2000) 23, note 52, Guideline 13.
[68] *Access to the Airwaves*, note 43, Principle 21.2.
[69] Recommendation (2000) 23, note 52, Guideline 14.
[70] Recommendation (2000) 23, note 52, Guideline 16.

should have the power to impose sanctions in accordance with the law." However: "Sanctions should be proportionate" and "[a] range of sanctions… should be available, starting with a warning." The power to apply sanctions for breach of content rules should be strictly regulated to prevent abuse. In particular, conditions should be placed on the application of more serious sanctions – such as fines and suspension or revocation of a licence – for breach of these rules. In such cases fines should be imposed only after other measures have failed to redress the problem, and suspension and/or revocation of a licence should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.[71]

Recommendations:

- The substantive criteria for deciding between competing licence applications should be clearly defined in the Law on Communications.
- The Law on Communications should provide that license application hearings are public and that the process should be fair and non-discriminatory.
- Article 15 should be amended to establish a system of graduated sanctions and to require that any sanctions applied are proportionate.

7. Freedom of Information

Mongolia has a wide range of laws protecting State secrets and privacy but there is no general law guaranteeing the right to access information held by public bodies, and none of the legal provisions on secrecy or privacy take freedom of information into account.

Under international law, freedom of information, including the right to access information held by public authorities, is guaranteed as an aspect of freedom of expression. Any restrictions on the right to freedom of information – for example, to protect national security or privacy – must be narrowly interpreted and convincingly established as necessary in a democratic society.

7.1 Access to Information Legislation

Mongolia does not have legislation providing for a comprehensive guarantee of the right to information in practice. There are a number of provisions dealing with the right in specific circumstances in various laws. These include the following openness obligations:

- resolutions of the Cabinet and decrees of the Prime Minister must be published in the Government News Bulletin (Law on the Cabinet of Mongolia, Article 31.1);
- organisations may not keep confidential information that discloses heath or environmental risks or crimes (Law on Privacy of Organisations, Article 6);

[71] *Access to the Airwaves*, note 43, Principle 27.2.

- candidates for local elections have a right to obtain necessary information from their local administrations (Law on Elections of Citizens Representatives Khurals of Aimags, the Capital City, Soums and Districts, Article 25.1);
- the State Privatisation Committee must make public information on state-owned legal entities before a process of privatisation (Law on Central and Local Government Property, Article 6.1);
- meetings of the State Ikh Khural shall be open and decisions must be published through the media (Law on the Procedures of Meetings of the State Ikh Khural, Article 4.9); and
- laws and decisions of the State Ikh Khural, orders of the President, resolutions of the Cabinet, and legal acts issued by Ministries must be published in the Government News Bulletin (Law on the Procedures of Meetings of the State Ikh Khural, Article 46.1).

While these measures are positive, they do not go nearly far enough and we understand that in practice it is very difficult for ordinary citizens without special connections to access information held by public authorities. It is now accepted that comprehensive legislation is necessary to ensure respect in practice for this important right. In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression noted:

> [T]he right of everyone to receive information and ideas … is not simply a converse of the right to impart information but it is a freedom in its own right. The right to seek or have access to information is one of the most essential elements of freedom of speech and expression.[72]

In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[73] His views were welcomed by the UN Commission on Human Rights.[74]

The Special Rapporteur further developed his commentary on freedom of information in his 2000 Annual Report to the Commission on Human Rights, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and realisation of the right to development.[75] He also reiterated his "concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs".[76]

The Committee of Ministers of the Council of Europe has also recently adopted a Recommendation on Access to Official Documents which states:

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[72] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1995/31, 14 December 1995, para. 35.
[73] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
[74] Resolution 1998/42, 17 April 1998, para. 2.
[75] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
[76] *Ibid.*, para. 43.

III
General principle on access to official documents

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.[77]

ARTICLE 19 has published a key standard setting work on this topic, *The Public's Right to Know: Principles on Freedom of Expression Legislation*.[78] This has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Annual Report.[79] These principles may be summarised as follows:

1. **Maximum disclosure:** The legislation should be guided by the principle of maximum disclosure.
2. **Obligation to publish:** Public bodies should be under an obligation to publish key information of their own motion.
3. **Promotion of open government:** Public bodies must actively promote open government.
4. **Limited scope of exceptions:** Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests.
5. **Processes to facilitate access:** Requests for information should be processed rapidly and fairly, and any refusal to disclose should be subject to an appeal to an independent body.
6. **Costs:** Individuals should not be deterred from making requests for information by excessive costs.
7. **Open meetings:** Meetings of public bodies should be open to the public.
8. **Disclosure takes precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
9. **Protection for whistleblowers:** Whistleblowers – individuals who release information on wrongdoing – should be protected.

Recommendation:
- An access to information law should be adopted in accordance with the principles set out above, guaranteeing everyone the right to access information held by public bodies.

7.2 Secrecy Provisions

7.2.1 State Secrets

Mongolian law protects State secrets in a general Law on State Secrets. Article 5 sets outs five areas of secrecy – national security; defence; economy, science and technology; secret operations and counter-intelligence; and procedures on execution

[77] Recommendation (2002) 2, 21 February 2002.
[78] (London: June 1999).
[79] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 43.

of criminals with capital charge – followed by an exhaustive list of information, documents and physical items that are secret.

Other laws also protect State secrets in various ways:

- The following persons and entities have a legal duty to maintain State secrets:
  - trade companies, offices and other organisations (Article 8.3, Law on National Security);
  - citizens (Article 9.1, Law on National Security);
  - civil servants (Article 13.7, Law on Civil Service);
  - government organisations and officials, in relation to petitions and complaints (Article 7.1.5, Law on Resolution of Petitions and Complaints Issued by Citizens to Government Organizations and Officials);
  - arbitration tribunals and participants, in relation to hearings (Articles 13.2 and 13.3, Foreign Trade Arbitration Law); and
  - employees of organisations in charge of official statistics (Article 22.1, Law on Statistics).
- Court and tribunal hearings must be closed when necessary to protect State secrets (Law on Criminal Investigation and Charge, Article 19, Foreign Trade Arbitration Law, Article 13.2 and Law on Procedure of Constitutional Court, Article 4).
- Meetings of the State Ikh Khural must be closed when State secrets are discussed (Law on Procedures of Meetings of the State Ikh Khural, Article 10.1).
- It is a crime, punishable by up to 8 years imprisonment, to disclose or destroy State secrets (Criminal Law, Article 71).
- It is prohibited to disclose confidential correspondence relating to the work of the Prime Minister and members of the Cabinet (Law on the Cabinet of Mongolia, Article 25.4).
- It is prohibited to disclose confidential correspondence relating to the work of the President (Law on the President of Mongolia, Article 16.5).
- The central registration of the treasury is a State secret (Law on the Legal Status of the Capital City, Article 12.2).
- It is prohibited to copy confidential location maps and data without authorisation (Law on Geodesy and Mapping, Article 12.1.4).
- Strict confidentiality applies to the purpose, scope and means of military recruitment (Law on Military Replenishment and Recruitment, Article 34).

Articles 25.7 and 25.8 of the Law on Archive allow State secrets kept in the archives to be disclosed to the public after 30, 50 or 70 years, depending on their status.

National security, privacy and some other interests are recognised under international law as a legitimate ground for imposing restrictions on the free flow of information.[80] However, national security in particular has historically been subject to wide-ranging abuse by authorities and, as a result, its scope needs to be defined as strictly and narrowly as possible if the right to freedom of expression and access to information is to be respected. ARTICLE 19 has adopted a set of principles on this topic, *The Johannesburg Principles: National Security, Freedom of Expression and Access to*

[80] ARTICLE 19, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information* (London, October 1995), Principle 1(c). See also *The Observer and Guardian v. United Kingdom*, (*Spycatcher* case), note 20 and *Incal v. Turkey*, 9 June 1998, Application No. 22678/93 (European Court of Human Rights).

Information. These *Principles* state that a restriction on freedom of expression is justified in the interests of national security only if its effect is to "protect a country's existence or its territory against the use or threat of force, or its capacity to respond to the use or threat of force."[81]

Furthermore, a State may not categorically deny access to all information related to national security, or other legitimate interests, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to prevent a real risk of harm to a legitimate national security interest.[82] In other words, it is only where actual harm is threatened that the right to information may be restricted. In some cases, disclosure may benefit as well as harm the aim. For example, corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

Information must still be disclosed unless the harm to national security or another legitimate aim is greater than the *public interest* in having the information, what is known as a public interest override.[83] Even if it can be shown that disclosure of the information would cause substantial harm to national security, the information should still be disclosed if the public interest benefits of disclosure outweigh the harm. In such cases, the harm to national security must be weighed against the public interest in having the information made public.

Many of the provisions in Article 5 are excessively broad. Examples of undue secrecy include the following:

- the number of annual military recruits (Article 5.2.7);
- the amount of State reserves (Article 5.3.2); and
- procedures on execution of criminals with capital charge (Article 5.5).

Such information is publicly available in most democratic countries and it is difficult to see how it can be justified as a State secret in Mongolia. Indeed, in most cases there are good reasons to release this information. For example, it is probably important to release information about State reserves to promote confidence in the economy. As a result, even if the State can show some reason for secrecy, there is an overriding public interest in knowing this information.

In addition, Article 5 of the Law on State Secrets lacks both a harm test and a public interest override.

The Criminal Law provides for up to 8 years imprisonment for disclosing State secrets. The Johannesburg Principles provide that no one should be punished for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.[84] These protections should be incorporated into the Criminal Law.

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[81] *Ibid*., Principle 2(a).
[82] *Ibid*., Principle 12.
[83] *The Public's Right to Know*, note 78, Principle 4.
[84] *Ibid*., Principle 15.

Recommendations:

- The secrecy provisions of the Law on State Secrets, as well as the many other laws which impose secrecy rules, should be reviewed and revised where they do not serve a legitimate secrecy interest. For example, the restrictions set out above in Articles 5.2.7, 5.3.2 and 5.5 of the Law on State Secrets should be repealed.
- All secrecy provisions should incorporate a substantial harm test as well as a requirement that this harm is greater than the public interest in having the information (i.e. a public interest override).

7.2.2 Secrecy of Private Organisations

The Law on Privacy of Organisations extends the regime of secrecy to private organisations. This law effectively requires organisations to establish a regime of secrecy and to develop internal procedures to protect such secrets (see, for example, Article 5.1). The impact of this is somewhat mitigated by Article 6 of the law, which lists a number of areas which may not be kept confidential (see Access to Information Legislation, above). These provisions are reinforced by Article 136 of the New Criminal Code, which will come into force on 1 September 2002, which makes it a crime punishable by imprisonment to reveal private secrets protected by law.

Article 227.1 of the New Criminal Code also makes it a crime to copy data stored on computers without permission. Article 164.1, dealing with illegally obtaining facts relating to financial issues, applies only where the information is used for a private motive. Article 227.1 contains no such protection. This may be of material importance, for example to investigative journalists, who publish information, even if obtained by dubious means, in the public interest and not for private gain.

While it is legitimate for private organisations to attempt to maintain the secrecy of some information they hold, there is no need for this to be required by law, or even backed up by law. In other democratic countries, outside of personal information (dealt with in numerous other legal provisions in Mongolia, see under Privacy, below), secrecy within private organisations is purely a discretionary and internal matter.

Recommendation:

- The provisions on secrecy in the Law on Privacy of Organisations should be repealed.

7.3 Privacy

Mongolian law provides very strong protection for privacy in Article 16.13 of the Constitution, a general Law on Individual Privacy and several provisions in other laws.

Article 16.13 of the Constitution protects the privacy of citizens, their families, correspondence and residence. Article 2 of Chapter 1 of the Law on Individual Privacy defines "individual privacy" as "information, documents or physical items

that are kept confidential…disclosure of which might cause significant damage to legitimate interests, reputation and esteem of the person in question." Article 1 of Chapter 2 states that individual privacy is of the following types: privacy of correspondence, health, ownership of property, family life and other types defined by law. Article 5 of Chapter 2 provides that persons who have access to private information of individuals by law or trust are prohibited from disclosing the information. Article 6 of the law does provide for privacy to be overridden, but only to protect national security and defence, a very limited set of conditions.

Other laws also protect individual privacy:

- The following persons and entities have a legal duty to protect information on individual privacy:
  - civil servants (Article 13, Law on Civil Service);
  - government organisations and officials, in relation to petitions and complaints (Article 7.1.5 of the Law on Resolution of Petitions and Complaints Issued by Citizens to Government Organizations and Officials);
  - employees of the State Security Protection system (Article 17.1.2 of the Law on Special State Protection); and
  - employees in charge of official statistics (Article 22.1 of the Law on Statistics).
- Article 146 of the Criminal Law provides for up to 3 years imprisonment for disclosing information on individual privacy.

Protection of individual privacy is recognised under international law as a valid reason for imposing restrictions on freedom of information. However, the presumption in favour of freedom information means that a State cannot refuse to disclose information unless disclosure threatens substantial harm to a privacy interest. Furthermore, it is essential that privacy provisions be subject to a general public interest override so that the information may be disclosed where the public interest in having the information is greater than the harm to the privacy interest being protected. Such an override is widely accepted around the world since otherwise privacy laws would seriously inhibit investigative reporting. Practically every instance of corruption also involves some privacy interest. Furthermore, where the individual concerned has consented to private information about him or herself being disclosed, the information should simply be disclosed without the application of a further test.

Mongolian law does not appear to apply the same level of concern to the question of monitoring communications. Article 12.1.1 of the Law on Secret Agency gives the State Secret Agency the power to monitor post and other communications secretly, in accordance with the law. It is not clear what conditions are imposed on monitoring, but it should be allowed only after approval by a judicial authority or in exceptional cases where urgent action is required.

Recommendation:

- The Law on Individual Privacy as well as all other laws protecting individual privacy:
  - provide for secrecy only where disclosure of information threatens to harm a legitimate privacy interest and where this harm is greater than the public interest in having the information; and
  - provide that where the individual in question has consented to the

disclosure, even private information should be disclosed.

- The power to monitor private communications should be allowed only in accordance with the conditions noted above.

8. Defamation

Article 16.17 of the Constitution, protecting the right to seek and receive information, allows for restrictions on these rights, including "to protect… dignity and reputation of persons." International law also recognises that in a democratic society freedom of expression may be restricted where necessary to protect a legitimate reputation interest.

At the same time, any legislation which restricts freedom of expression in order to protect the reputation of others must have the genuine purpose and demonstrable effect of protecting a legitimate reputation interest. Furthermore, a restriction cannot be justified unless it can be convincingly established that it is necessary in a democratic society. ARTICLE 19 has adopted a set of Principles on this issue, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, which note that restrictions on freedom of expression cannot be justified if:

i. less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or
ii. taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.[85]

A recent study by the Mongolian Foundation for Open Society (MFOS) of the use of defamation laws in six district courts in Ulan Bator over the last three years shows that the number of defamation cases (83 in total over that period, 4 of which were criminal cases) shows no sign of abating.[86] Furthermore, in the vast majority of cases, the defendants are either found to be in breach of the law or admitted such a breach and settled. Indeed, defendants were only cleared of charges of defamation in 4 of the 79 civil cases reviewed.

8.1 Criminal Defamation

Reputations are protected in both the civil and criminal laws of Mongolia. Article 117 of the Criminal Law states:

> 1. Criminal charge shall be imposed for defaming reputation and esteem of others by distributing false implicit or explicit accusation of up to one year imprisonment, compulsory works for the same period or a fine of togrog 10000 to 50000.
> 2. If the offence is made by publication of false accusation or other distribution of copied material, or sending an anonymous letter, or by a person who was criminally charged previously, the person responsible shall be charged for

[85] (London: July 2000), Principle 1.
[86] *Project "Legal Aid for Media"*, Ulan Bator, 2001.

up to 2 years imprisonment or compulsory works for up to 1 and a half years, or by a fine of togrog 25000 to 50000.
3. If, due to false accusation, the victim is to be charged with severe criminal offence, the person responsible shall be charged for up to 4 years imprisonment.

Article 118 states further:

1. Criminal charges shall be imposed for deliberate defamation of reputation and esteem of others in oral, written, or other forms with up to 6 months compulsory works or a fine of up to togrog 10000.
2. If the offence is made by a person who was charged of a similar offence, or by way of publication in press, the person responsible shall be imposed a charge of compulsory works of 1 and half years or a penalty of togrog 20000 to 80000.

The New Criminal Code, due to come into effect on 1 September 2002, also contains defamation provisions, similar to these, at Articles 110 and 111, which make it a crime to insult others or to spread false information about them. The New Criminal Code also contains Article 231.1 which specifically makes it an offence to insult State workers – including judges, prosecutors, and customs and tax officers – punishable by up to three months' imprisonment.

ARTICLE 19 and Globe International are of the view that defamation laws should never be criminal in nature. This is reflected in our Principle 4(a), which states:

> All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

In many countries, the protection of one's reputation is treated primarily or exclusively as a private interest. Experience shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations, and hence unjustifiable as a restriction on freedom of expression. In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate and there is always potential for abuse, even in countries which otherwise provide a relatively high degree of protection to freedom of expression. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression and such sanctions cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. For these reasons, the criminal defamation laws in Mongolia should be repealed.

Regardless of the above, as long as criminal defamation laws remain in force, they should immediately be amended to respect the following conditions:

i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with

actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;

iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[87]

Of the four criminal defamation cases reviewed in the MFOS study, only one resulted in a sentence of imprisonment and that was substituted by probation. However, even a small number of such sentences can have a serious chilling effect on freedom of expression.

8.2 Civil Defamation Laws

Defamation is also covered by Article 7 of the Civil Law as follows:

1. If citizens or legal entities consider that their name, dignity or business reputation has been defamed, then they shall be entitled to contest that defamation and claim for the recovery of damage caused by that defamation.
2. If the person who disseminated the information referred to in paragraph 1 of this article cannot prove its accuracy, then that person shall be liable to compensate for any damage caused.
3. A court shall determine the amount of damage caused by the defamation of name dignity or business reputation as well as the means of its recovery in accordance with the rules and producers set out in this law.

Article 277 of the Civil Law provides that a person who causes damage to another's reputation or dignity must fully compensate for that damage. Furthermore, Article 392 of the same law states:

1. If a person disseminates information which damages another's dignity, reputation or goodwill and is unable to prove that his or her action was truthful, that person must compensate for that damage by money or otherwise regardless of whether there has any material loss.
2. A court shall determine the amount of monetary compensation for nonmaterial damage within the amount of the plaintiff's claim taking into account the way information was disseminated, the scope of its dissemination, the moral consequences to the injured person and other things, and shall instruct the information was disseminated or otherwise.

Pursuant to Article 8.3 of the Civil Law, the capacity of a person to bring a case terminates upon his or her death.

One problem with these civil defamation provisions is that they allow public bodies to bring defamation actions. One of the cases reviewed in the MFOS study was brought by a government agency. Article 7.1 of the Civil Law provides that "citizens" or

[87] *Ibid*., Principle 4.

"legal entities" – which presumably includes both private and public bodies – may bring legal action. While individuals or private legal entities should have the right to sue for defamation, this right should not extend to public bodies.[88] Superior national courts in a number of countries have limited the ability of public authorities, including elected bodies, State-owned corporations and even political parties, to bring an action for defamation. This is in recognition of the vital importance in a democracy of open criticism of government and public authorities, the limited and public nature of any reputation these bodies have, and the ample means available to public authorities to respond to criticism.

Another problem is the fact that Articles 7.2 and 392.1 of the Civil Law place the onus on the person who disseminated the allegedly defamatory statement to prove that the information was "accurate" or that it was "truthful". This poses a significant burden on the defendant and has a chilling effect on freedom of expression, for example in situations where the defendant has proof of truth but this proof is not admissible in court due to strict evidentiary rules. This has been recognised in a number of countries, where the onus has been shifted to the plaintiff, for example in cases involving public officials.[89] As a result, at least in cases involving statements on matters of public concern,[90] the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.[91]

A third problem with the civil defamation laws is that they fail to provide for a defence of reasonable publication. Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication.[92] This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. The media, in particular, are under a duty to satisfy the public's right to know in a timely fashion and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public's right to know. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not.

In determining whether dissemination was reasonable in the circumstances of a particular case, courts should take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

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[88] *Ibid*., Principle 3.
[89] See, for example, *New York Times v. Sullivan*, 376 US 254 (1964) (United States Supreme Court).
[90] The term 'matters of public concern' includes all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.
[91] *Defining Defamation*, note 85, Principle 7.
[92] *Defining Defamation*, note 85, Principle 9.

These problems are exacerbated by the fact that, as evidenced by the MFOS study, a large number of those bringing defamation cases are officials or other public figures. It is established that these individuals must tolerate a greater degree of criticism than other people due to the public role they play and the fact that they have accepted public scrutiny of their actions through their positions.

We understand that under Mongolian law, the Supreme Court has the power to issue "suggestions" regarding interpretation of the law and that these suggestions are normally followed. A suggestion has been issued to the effect that cartoons and satirical material should not be subject to liability in defamation, a view which we support.

Recommendations:

- Articles 117 and 118 of the Criminal Law, and Articles 110, 111 and 231.1 of the New Criminal Code should be repealed. If they remain in force, they should conform fully to the conditions set out above.
- Article 7.1 of the Civil Law should be amended to provide only individuals and private legal entities have the right to bring defamation actions.
- Articles 7.2 and 392.1 of the Civil Law should be amended to provide that in cases involving statements on matters of public concern, the plaintiff bears the burden of proving the falsity of any statements or imputations of fact.
- Articles 7 and 392 of the Civil Law should provide for a defence of reasonable publication, even when a statement of fact on a matter of public concern has been shown to be false.

9. Content Restrictions

9.1 General Content Restrictions

A number of Mongolian laws restrict the content of what may be published or broadcast. In most cases, these laws do protect legitimate aims but they are often either excessively broad or set out in terms which are unnecessarily vague and hence open to abuse. A number of provisions relating to obscenity are found in various laws, including the following prohibitions:

- on selling or otherwise distributing to minors prints or movies containing sexual trespass to minors (Criminal Law, Article 256);
- on publishing, distributing or selling pornographic material (New Criminal Code, Article 123);
- on promoting obscenity (Law on Administrative Punishment, Article 41);
- on undertaking cultural activities that promote obscenity (Law on Culture, Article 19.3);
- on disseminating material advertising crimes, pornography or violence to the child (Law on the Protection of the Rights of the Child, Article 6.5); and
- on promoting obscenity in various ways (Law on Measures Against Obscenity, Article 5).

One problem here is the large number of different provisions in different laws. This opens up the possibility of different interpretations of the scope of obscenity under different laws and, effectively, multiple standards being applied in this area. This, in turn, makes it difficult for individuals to know precisely what is prohibited, leading to self-censorship and excessive caution. These provisions should all be brought together in one law.

A second problem is that obscenity, a notoriously subjective term, is nowhere defined. This is a difficult problem, but at least some guidance should be provided in the law as to the scope of this term. Otherwise, there is a risk that different judges will interpret the term very differently, leading to the problems noted above. This problem is exacerbated by Article 9 of the Law on Measures against Obscenity, which provides for the publication of erotic material, which is allowed, unlike obscenity. Article 9.3, however, provides that erotic material may only be released after being examined by the central government, a form of prior censorship. Prior censorship is banned outright in many legal systems[93] and viewed with extreme suspicion elsewhere. Prior censorship in relation to such a subjective concept as obscenity is highly problematical from the perspective of freedom of expression.

Finally, there are serious problems with the way these provisions are implemented. In 1997 some five publications were closed on grounds on obscenity and a further three were closed in 2000. This is permitted by Article 13.2.3 of the Law on Measures against Obscenity. In our view banning publications is never justified. The appropriate remedy for offences of this sort is to impose fines on the publication and, where warranted, to bring criminal charges against those individuals responsible for any crimes. These measures should prove sufficient to prevent abuse of the law, without resort to the extreme measure of banning a publication.

Other laws provide for more general restrictions on content. For example, Article 19.3 of the Law on Culture makes it a crime to conduct cultural activities that promote wars and aggression, or pose a threat to the sovereignty of Mongolia. Similarly, Article 11.4 of the Law on Prevention of Crimes prohibits encouraging crimes, including murder, and displaying their details. Article 86 of the New Criminal Code prohibits the promotion of hostility and discrimination on the basis of race, while Article 144 prohibits the intentional dissemination of "cruel religious doctrine". Article 298.1 of the same law prohibits calling for war in public.

These are, by-and-large, legitimate goals but again the provisions are cast too broadly and in some cases are excessively vague. It is now well-established that a clear link needs to be established between the material in question and the risk of harm. Merely promoting aggression or crime does not meet the requisite nexus; instead, it should be required to be shown that the expression in question directly incites aggression or crime. Furthermore, it should not be prohibited to display the details of crimes; indeed, the public has a right to this information. An example of a provision that is excessively vague is the prohibition on disseminating "cruel religious doctrine" which would clearly mean different things to different people.

[93] See, for example, Article 13.4 of the Inter-American Convention on Human Rights, which bans prior censorship except to protect children.

Recommendations:

- The various provisions relating to obscenity should be brought together in one law.
- The term obscenity should be defined in the law.
- Prior censorship should not be applied in relation to obscene or erotic material.
- Publications should not be banned outright for publishing obscene material. Instead, fines should be imposed and those responsible brought to justice.
- Restrictions on content to prevent aggression, war and crime should be limited to cases where the expression in question directly incites to these forms of harm.
- Displaying the details of crimes should not be prohibited.

9.2 Protecting the Administration of Justice

9.2.1 Prohibiting Certain Types of Material

Various Mongolia laws contain restrictions purportedly to maintain the authority of the administration of justice. These include the following:

- It is prohibited to disclose documents relating to a preliminary investigation and case files, without authorisation by the bailiffs, investigators and persons responsible for the case filings (Criminal Law, Article 209, New Criminal Code, Article 257.1).
- Court hearings must be open unless closure is necessary to protect State secrets, as well as privacy, reputation and social order (Law on Criminal Investigation and Charge, Article 19).
- Decisions by the Council of Judges shall be made in the decision room with no one but judges present (Law on Criminal Investigation and Charge, Article 294).
- It is prohibited to obstruct or seek to influence unlawfully the activities of the TSETS (constitutional court) (Law on the Constitutional Tsets (Court), Article 23.3).
- Arbitrators may, at their own initiative or upon request, conduct an arbitration hearing in a closed session (Foreign Trade Arbitration Law, Article 13.2).
- It is prohibited to present a view on the guilt or otherwise of an individual before the court has made a pronouncement on the issue (Law on Prevention of Crimes, Article 11.5).

Rules relating to reporting on legal cases are justified by reference to two goals, namely maintaining the authority of the judiciary and protecting the rights of the accused to a fair trial, including the presumption of innocence. Regarding the former, restrictions on freedom of expression cannot be justified simply to maintain respect for a public institution unless such respect is necessary for that public institution to be able to function. As a result, restrictions on freedom of expression to maintain the authority of the judiciary are legitimate only to the extent that they are necessary to ensure reliance on the courts, rather than illegal means, as the final arbiters of disputes in society. It is noteworthy that in the United States, where the media are almost entirely free to criticise the courts and judges, there is no indication that this has undermined the role of the courts. ARTICLE 19 and Globe International believe that

restrictions on freedom of expression simply to maintain the authority of the judiciary can no longer be justified.

Media reporting may be restricted, and/or secrecy imposed, where it can be shown that this would undermine the right of an accused person to a fair trial or seriously affect the legal process. However, in many instances restrictions are imposed which are most unlikely to have this result. Courts, and jurors, are exposed to the arguments and strategies of clever public prosecutors whose only goal is to see individuals convicted. In light of this, claims that media coverage would bias a trial need to be regarded with extreme suspicion. Indeed, in the absence of a concerted media campaign, it will be extremely rare that media coverage of itself will lead to bias. The little social science research in this area suggests that jurors are far more resistant to bias in the media than the paternalistic laws in place in many countries recognise.

The Mongolia rules do serve legitimate aims but further conditions are required to ensure that they do not unnecessarily restrict freedom of expression. In particular, they should be subject to harm tests. For example, arbitrators should not be able to close a hearing unless they can show that a legitimate interest would be harmed. The same should apply to the question of venturing an opinion on the guilt or otherwise of an accused person.

Recommendation:

- The restrictions above should, where this is not already the case, apply only where the expression in question poses a serious risk of harm to the administration of justice or the defence of an accused person.

9.2.2 Restrictions on Expression by Various Officials

A number of provisions in Mongolian law restrict the freedom of expression of certain officials. The following officials, for example, are required to respect their official positions when exercising their right to express opinions, including about whether or not they believe in God:

- judges (Law on Court, Article 62.2);
- public prosecutors (Law on Public Prosecutor's Office, Article 62.2);
- policemen (Law on the Police Authority of Mongolia, Article 21.2); and
- members of the National Human Rights Commission (National Human Rights Commission Law, Article 23.3).

In other countries any professional restrictions of this sort are applied not through criminal, or quasi-criminal provisions like these, but rather through professional bodies. This ensures first that sanctions will be appropriate and that consideration of these issues will be sensitive to the actual needs of the profession. Furthermore, the restrictions as set out in Mongolian law are too broad. It is not legitimate to require professionals to speak with respect of their profession although they may be professionally prohibited from speaking in a manner that is clearly incompatible with their professional responsibilities.

Recommendation:

- The restrictions on professionals right to freedom of expression noted above should be repealed. This issue should be dealt with at a professional level through professional bodies, rather than the criminal law.

10. Positive Obligations

10.1 Promoting General Social Goals

A number of Mongolian laws impose obligations on the media. Article 11.1 of the Law on Prevention of Crime states that "the main purpose of the media shall be to prevent crimes, to inform the public of their reasons, conditions and effects of crimes and to warn the public through published or broadcast information." Article 9.1 of the Law on Anti-Alcoholism states that "media… shall have an obligation to promote anti-alcoholism and educate the public on consequences of alcoholism." Article 6.1 of the Law on Measures Against Obscenity states that "media… shall have an obligation to educate the public about consequences and effects of obscenity and to promote prevention of sexually transmitted diseases and HIV/AIDS."

International courts have recognised that in a democratic society, the media has two specific public functions, namely to inform the public and to act as a "watchdog" of government. The European Court of Human Rights has stated:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would by unable to play its vital role of "public watchdog.[94]

The imposition of positive obligations on the media cannot be justified under international law. Although the media may well wish to promote these positive social goals, there are serious problems with making it a legal obligation for the media to do so. The nature of the obligation is unclear in several important respects. For example, how far do the media have to go to fulfil this obligation? What sort of material would satisfy the obligation (e.g. a soap opera which displayed the problems of alcoholism, specific targeted programmes, etc.)? This lack of clarity could be abused by the authorities to harass media which were critical of their policies. Furthermore, these are just some from among a wide range of important social issues which the media should address. It is up to the media, not the authorities, to decide which social issues they wish to focus on. As a result, the promotion of positive social goals is a matter for independent editorial decision-making, not legal regulation.

Recommendation:

- The obligations imposed on the media in Article 11.1 of the Law on Prevention of Crime, Article 9.1 of the Law on Anti-Alcoholism and Article 6.1 of the Law on Measures Against Obscenity should be repealed.

[94] See *Castells v. Spain*, note 20, para. 43; *The Observer and Guardian v. UK*, note 20, para. 59; and *The Sunday Times v. UK (II)*, note 20, para. 65.

10.2 Specific "Must Carry" Requirements

A wide range of laws in Mongolia impose positive obligations on the media to carry certain types of messages from the State:

- Broadcasters must play the national anthem daily (Law on State Symbol, Articles 21.1.5 and 21.1.6).
- Organisations involved in communication and information are required to transmit information in case of attack and during disasters and accidents (Law on Civil Defence, Article 8.3).
- The media must provide information to the public about natural disasters (Law on Meteorological and Environmental Assessment and Analysis, Article 13.4).
- The media are required to publish or broadcast urgent information to prevent crime (Law on Prevention of Crime, Article 11.2).
- The media must announce the commencement and cessation of war (Law on War Regime, Articles 5.4 and 6.3).
- The media must publish or broadcast urgent information necessary to prevent and destroy fires (Law on Fire Security, Article 22.1).
- The broadcast media must carry information and warnings about food safety (Law on Food, Article 6.16.2).
- The print media must provide information about the possible effects of alcoholic beverages failing to meet regulatory standards (Law on Anti-Alcoholism, Article 10.2).
- The media, as well as religious and public organisations and business entities, are required to educate the public about HIV/AIDS prevention (Law on Prevention of HIV/AIDS, Article 8).

Requiring the media to carry certain types of messages is both unnecessary and may be abused. Such requirements are very rare in other countries and yet media coverage of matters of public importance is adequate. Professional media outlets will carry the information described above; there is no need to make this a legal obligation. The most effective way to ensure wide dissemination of such information is by promoting a diverse, independent media, not by imposing obligations on the media.

Furthermore, positive obligations of this sort are open to abuse, as noted above. Independent media may be harassed, and even closed, for allegedly failing to fulfil these vague requirements. In addition, public bodies may abuse their right to have messages carried in the media.

Even in relation to public service broadcasters, which have far greater obligations in this area than the private media, the Committee of Ministers of the Council of Europe has voiced concern over "must-carry" requirements, stating:

> The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities,

should be confined to exceptional circumstances expressly laid down in laws or regulations.[95]

Public messages are a matter for editorial decision-making and should not be imposed as a legal requirement.

Recommendation:
- The provisions in the above laws requiring the media to carry certain specific information should be repealed.

10.3 Powers to take over the Media

A number of provisions in various laws allow the authorities to take over communications media in certain circumstances, such as a war, natural disasters or to assist in combating crime. Specific provisions of this sort include the following:
- the State can mobilise communications networks in the event of a war, martial law or an extreme natural emergency (Law on Communications, Articles 23.1 and 25.2.5);
- the police can use communications media to transmit information on crimes (Law on the Police Authority of Mongolia, Article 26.1.2);
- in case of an emergency regime, measures can be taken to confiscate temporarily, to control or to terminate media outlets (Law on State of Emergency, Article 16.1.4);
- prison employees can use communication and media outlets to assist in their efforts to capture escaped prisoners (Law on Satisfying Judgement, Article 8.11.3); and
- executive government authorities and their employees can use the premises of communications and media outlets where necessary (law on Executive Activities, Article 13.2.2).

The legal framework for the media and communications generally should not allow State actors to assume control of the media – either over their equipment or their output – in an emergency or in the other circumstances specified in the laws noted above. Should a genuine state of emergency arise which absolutely necessitates such measures, special legislation can be passed at that time, to the extent strictly required by the exigencies of the situation, in accordance with international law.[96] The provisions above grant the authorities very broad powers to take over the media which may be subject to abuse.

Recommendation:
- The provisions in the above laws allowing the authorities to take over the media and/or communications systems in various circumstances should be repealed.

[95] Recommendation No. R (96) 10, note 44.
[96] *Access to the Airwaves*, note 43, Principle 4.

11. Protection of Sources

Mongolian law does not provide for protection of journalists' sources. We understand, however, that the Supreme Court has issued a suggestion to the effect that source confidentiality should be respected.

Under international law, it is well recognised that a key aspect of freedom of expression is the public's right to receive information and that journalists merit special protection because they contribute to this right by maintaining the free flow of information.

As the European Court of Human Rights has stated:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms…. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[97]

This issue was considered so important that the Committee of Ministers of the Council of Europe adopted a specific Recommendation on the Right of Journalists not to Disclose Their Sources of Information, elaborating on the scope of this right. This Recommendation notes that an order for disclosure should not be made unless it can be convincingly established that:

> *i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
> *ii.* the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
> - an overriding requirement of the need for disclosure is proved,
> - the circumstances are of a sufficiently vital and serious nature, [and]
> - the necessity of the disclosure is identified as responding to a pressing social need….[98]

Although the suggestion on this topic by the Supreme Court is welcome, we believe legislation providing protection for the right not to reveal confidential sources of information is necessary.

Recommendation:

- Mongolian law should provide for protection of journalists' sources in accordance with the standards set out above.

[97] *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123, para. 39.
[98] Recommendation No. R (2000) 7, adopted 8 March 2000, Principle 3.

12. Media Coverage of Elections

Under international law, political parties and candidates have a right to express their views freely through the mass media, the public has a right to hear those views and citizens have a right to adequate and balanced information to enable them to participate fully in voting to choose the future government. These are based on the rights to freedom of expression and non-discrimination, as well as the right to political participation.

The Electoral Law of the State Great Hural of Mongolia, the Mongolian Presidential Election Law, the Law on Public Elections and the Law on Elections of Citizens Representatives Khurals of Aimags, the Capital City, Soums and Districts all provide for media coverage of elections.

ARTICLE 19 has adopted a set of Principles on media coverage of elections, *Guidelines for Election Broadcasting in Transitional Democracies*, setting out the appropriate standards in this area.[99]

12.1 Voter Education

During the period preceding an election, the public media have a duty to inform voters about the political parties, candidates, campaign issues, voting processes and other matters relevant to the election.[100]

Article 6.2 of the Presidential Election Law provides that the State media have a duty to inform the public about the preparation for and results of the election. Article 9.2 of the Law on Public Elections provides that the State media have a duty to inform the public about the preparation for and conduct and results of elections. The Electoral Law of the State Great Hural and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts do not provide for voter education.

12.2 Balance and Impartiality

Public media, both print and broadcast, have a duty to be balanced and impartial at all times, and particularly during elections.[101] The private print media has a right to express political preferences.[102] However, the fact that the private broadcast media occupy a limited public resource, namely the airwaves, along with the power of the broadcast media to influence opinion, means that it is important that private broadcasters also respect the need for balance and impartiality during election periods. Such balance is best achieved through self-regulation but, in the absence thereof, may also be imposed, for example through an independent broadcast regulator.

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[99] (London: August 1994).
[100] ARTICLE 19, Guidelines, note 99, Nos. 1 and 11.
[101] See, for example, Recommendation No. R(96)10, note 44, Guideline VI.
[102] Recommendation No. R (99) 15 on Measures Concerning Media Coverage of Election Campaigns, 9 September 1999, Section I(1).

In line with the above, the Committee of Ministers of the Council of Europe has recommended the following:

> Member States should adopt measures whereby print media outlets which are owned by public authorities when covering electoral campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.
>
> Where self-regulation does not provide for this, member States should adopt measures whereby public and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes, including discussion programmes such as interviews or debates.[103]

Article 4 of the Electoral Law of the State of Great Hural provides that information and reports of the central and local mass media shall be "correct and objective". Article 21.5 of the same law forbids media other than those owned by political parties from engaging in exclusive propaganda on behalf of one party, coalition or candidate. Article 6.3 of the Presidential Election Law also provides that information published by the mass media must be "true and correct", but does not have a provision specifically forbidding State media from engaging in exclusive propaganda for one candidate. The Law on Public Elections and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts do not have any such provisions. Article 3.3 of the draft Law on Public Radio and Television requires the public broadcaster not to promote any particular political party or force.

12.3 Direct Access Programmes

Free direct access to airtime for political parties and candidates, at least in the public media, is arguably required by international law in transitional democracies as an essential means for ensuring that voters can make informed electoral choices.[104] It is essential that this airtime is allocated to political parties and candidates on a fair and non-discriminatory basis. The Council of Europe Recommendation states:

> Member States may examine the advisability of including in their regulatory frameworks provisions whereby free airtime is made available to political parties/candidates on public broadcasting services in electoral time.
>
> Wherever such airtime is granted, this should be done in a fair and non-discriminatory manner, on the basis of transparent and objective criteria.[105]

The same requirement applies to plebiscites and referendums, where equal airtime must be allocated to each side.[106]

The Electoral Law of the State Great Hural (Article 21.3), the Presidential Election Law (Article 28.3) and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts (Article 23.2) all grant free direct access to airtime for political parties and/or candidates in the public media. They do

[103] *Ibid*., Sections I(2) and II(2). See also ARTICLE 19 Guidelines, note 99, Nos. 2 and 8.
[104] ARTICLE 19 Guidelines, note 99, No. 9.
[105] Recommendation No. R (99) 15, note 102, Section II(4). See also ARTICLE 19 Guidelines, note 99, No. 9.
[106] ARTICLE 19 Guidelines, note 78, No. 15.

not, however, include provisions ensuring that the scheduling of this time is fair, as some time slots (prime time) are obviously far more influential than others. The Law on Public Elections has no such provision.

12.4 Paid Political Advertising

International law is ambivalent on the question of whether political parties should be allowed to purchase advertising space in the media during election periods and the practice of States on this varies. Where such access is allowed, however, it is important that all parties have equal opportunity to purchase advertisements, including equal rates of payment, and that the public is aware that the message is a paid political advertisement.[107]

The Electoral Law of the State Great Hural (Article 21.4), the Presidential Election Law (Article 28.4) and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts (Article 23.3) all provide for commercial advertising by political parties, but do not impose the conditions set out above.

12.5 Content Restrictions

It is essential that parties be given wide scope to present their views and programmes to the public. Any media required to carry direct access political broadcast should not be required to censor these broadcasts. For the same reason, broadcasters should be allowed to refuse to carry such broadcasts only in very limited circumstances. At the same time, laws of general application, for example relating to defamation, remain in force during election periods and these laws often provide for liability not only of the author of statements but also of those who publish or broadcast the statements.

As a result, to prevent the media from being required to screen election programmes for actionable or illegal content, it is increasingly being recognised that the media need to benefit from some form of immunity for statements made by parties and candidates during direct access programmes.[108]

None of the election laws exempt the media from legal liability for unlawful statements.

12.6 Right of Reply

Due to the particular power of defamatory statements to cause injury during campaign periods, redress for such statements should be available in a timely fashion. An opportunity to reply, or to a correction or retraction, can provide a particularly timely and effective remedy in these circumstances.[109] The Council of Europe Recommendation states:

[107] Recommendation No. R (99) 15, note 102, Section II(5).
[108] See ARTICLE 19 Guidelines, note 99, No. 6.
[109] ARTICLE 19 Guidelines, note 99, No. 7.

> Given the short duration of an election campaign, any candidate or political party which is entitled to a right to reply under national law or systems should be able to exercise this right during the campaign period.[110]

None of the election laws provide for a right of reply.

12.7 Opinion Polls and Election Projections

Opinion polls can exercise particular influence on the outcome of elections and can also be quite distorting. As a result, they are subject to strict reporting requirements in many countries so that the public are able to accurately assess and understand the poll's significance.[111] In recognition of this, the Council of Europe Recommendation states:

> Regulatory or self-regulatory frameworks should ensure that the media, when disseminating the results of opinion polls, provide the public with sufficient information to make a judgement on the value of the polls. Such information could, in particular:
> - name the political party or other organisation or person which commissioned or paid for the poll;
> - identify the organisation conducting the poll and the methodology employed;
> - indicate the sample and margin of error of the poll;
> - indicate the date and/or period when the poll was conducted.[112]

None of the election laws require opinions polls or election projections to provide such information.

12.8 Monitoring and Complaints Body

It is essential that candidates, parties, members of the public and media workers themselves have access to a complaints system as a means of ensuring that the obligations above are respected.[113] While ultimate recourse to the courts in these matters is essential, the cut and thrust of politics, particularly during elections, requires a rapid, accessible forum for addressing complaints. There is, therefore, a need for an independent administrative body with full powers to redress any breaches of the above obligations. Furthermore, while the actions of this body must be subject to judicial review, such court oversight must be carried out on an expedited basis.[114]

Although there is a General Election Committee, which has the power to allocate airtime,[115] it does not appear that it has a mandate to hear and take action on complaints.

Recommendations:
- The Electoral Law of the State Great Hural of Mongolia and the Law on Elections

[110] Recommendation No. R (99) 15, note 102, Section III(3).
[111] See ARTICLE 19 Guidelines, note 99, No. 12.
[112] Recommendation No. R (99) 15, note 102, Section III(2).
[113] ARTICLE 19 Guidelines, note 99, No. 13.
[114] ARTICLE 19 Guidelines, note 99, No. 14.
[115] See Article 21.4 of the Electoral Law of the State of Great Hural and Article 23.3 of the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts.

of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts should require the public media to provide voter education during their respective election periods.

- The Presidential Election Law, the Law on Public Elections and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts should have provisions requiring the public media to be balanced and impartial during elections.
- The Law on Public Elections should provide for free direct access to airtime, on a basis of equality, including in relation to the timing of slots, for both sides; the other election laws should require direct access slots to be equitable, including in relation to the timing of these slots.
- The Electoral Law of the State Great Hural, the Presidential Election Law and the Law on Elections of Citizens' Representatives Khurals of Aimags, the Capital City, Soums and Districts should require any media offering commercial political advertising to do so on an equal and non-discriminatory basis, regardless of politics or party affiliation. Furthermore, such advertisements should clearly be identified as such, so that the public is aware that the message is a paid political advertisement.
- All the election laws should:
  - exempt the media from legal liability for unlawful statements during direct access programmes;
  - provide for a right of reply during election campaigns;
  - require opinions polls or election projections to provide the information set out above; and
  - ensure prompt and effective oversight by an independent body which has a mandate to hear and take action on complaints about media coverage of elections.

13. Conclusion

Mongolia has, since the end of communist rule, undertaken a number of important steps towards establishing a more democratic system of governance, as well as ensuring respect for human rights. Freedom of expression is now far more respected in practice than was formerly the case, as evidenced by a relatively healthy and diverse media sector. At the same time, numerous legal restrictions on the right to freedom of expression still exist and many of these provisions are actively applied.

A key area for reform is regulation of the media. All media outlets are required to register, an anachronistic and unnecessary burden which may be open to abuse. Furthermore, regulation of the broadcast media is undertaken by a body which is not sufficiently protected against political interference. The same problem applies to the public broadcaster; a new draft law for this broadcaster does somewhat enhance independence but fails to do so in a fulsome manner. The independence of any body with regulatory or governing powers over the media must be guaranteed by law and respected in practice.

A number of oppressive restrictions on the content of what may be published or broadcast remain in place in Mongolia. Perhaps the most serious of these are the

defamation laws, which are both criminal and civil, and which are employed with great frequency against the media. There is no doubt a lot of irresponsible reporting but this cannot justify the defamation laws which are in place. Strict rules prohibit publication of obscenity and these have been used to ban a number of publications. Overarching restrictions on reporting relating to legal processes, known as contempt of court laws in some countries, make it difficult for the media to report on cases in the public interest.

Perhaps the most serious problem is the regime of secrecy that is provided for by law and backed up by an overriding official reluctant to disclose information. There is no freedom of information law, so individuals have no legal right to access information held by public officials. Instead, there are a panoply of laws making it a crime to disclose secrets, defined very broadly. The secrecy regime even extends beyond the public sphere, forcing private bodies to establish their own secrecy systems.

As the Report shows, there is urgent need for a comprehensive programme of reform to bring Mongolian laws restricting freedom of expression and information into line with international standards and to ensure full respect for these fundamental rights. Freedom of expression and information are at the heart of a democratic system of government and it is only where these key rights are respected, in law and both practice, that democracy can thrive.